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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SYRUS PARVIZIAN, Plaintiff and Appellant, v. MARGARET A. JEWETT, Defendant and Respondent.	B163437 (Los Angeles County Super. Ct. No. LC 061185)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Alder, Judge. Reversed and remanded with instructions.

Syrus Parvizian, in pro. per., for Plaintiff and Appellant.

Margaret A. Jewett for Defendant and Respondent.

Syrus Parvizian appeals from: (1) an order of dismissal after the court sustained respondent, Margaret A. Jewett 's demurrer to Parvizian's legal malpractice complaint; and (2) an order denying appellant's Code of Civil Procedure[1] section 473 motion. Below the trial court sustained the demurrer without leave to amend, concluding the proof of service proved that respondent was no longer acting as attorney for appellant in the underlying family law case when the asserted malpractice took place, and therefore, the appellant's complaint could not be amended to state a cause of action. As set forth below, we conclude the court erred in sustaining the demurrer. The trial court properly took judicial notice of the proof of service of the order relieving respondent as appellant's counsel. Moreover, respondent no longer represented appellant when the alleged injury (i.e., the default entered against appellant in the underlying case) occurred. Nonetheless, appellant sufficiently pled the default was caused by respondent's actions while she represented him. Accordingly, we reverse and remand.[2]

FACTUAL AND PROCEDURAL HISTORY

Underlying Family Law Action.

On April 12, 2000, appellant retained respondent to represent him in his pending family law, divorce action. On April 13, 2001, the trial court heard and granted respondent's motion to be relieved as attorney for appellant in the matter. Three days later, respondent filed the proof of service of the order.

Thereafter, on June 20, 2001, appellant appeared in pro. per. at an OSC hearing in the family law matter. The OSC related to "Sanctions for Respondent's Failure to Appear at 04/02/01 MSC." Because appellant had not filed a Mandatory Settlement

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[1] All references are to the Code of Civil Procedure unless otherwise indicated.

[2] Because we conclude the trial court erred in sustaining the demurrer we do not reach the merits of appellant's contentions on the section 473 issue.

Conference Brief, the court entered a default against appellant in the divorce proceeding. In October 2001, default judgment was entered against appellant.

The Legal Malpractice Action

On June 11, 2002, appellant filed a complaint for legal malpractice against respondent. Respondent filed a demurrer and a motion to strike appellant's complaint. Respondent also filed a request for judicial notice, requesting the court to take judicial notice of the family law case file, which included the order relieving her as appellant's counsel in the underlying action and the proof of service of the order. In mid-August 2002, the court sustained the demurrer with leave to amend.

On August 21, 2002, appellant filed a first amended complaint. In his complaint, appellant alleged the malpractice injury he suffered was, *inter alia*, the entry of default in the underlying action on June 20, 2001, and the subsequent dismissal of his action in October 2001. He further alleged the actions, including the failure to file a Mandatory Settlement Conference Brief, which directly led to the injury, occurred before April 13, 2001, when respondent was relieved as his counsel.[3]

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[3] Appellant alleged as a result of various acts and omissions of respondent, a default judgment was entered against him in the underlying action. Those acts and omissions were:

"a) On or about April 5, 2001, Defendant failed to file a mandatory settlement conference brief which resulted in a default judgment against the PLAINTIFF;

"b) On or about September 19, 2000, Defendant failed to prepare responses to the discovery in the underlying case which resulted in the court ordering sanctions both monetary and evidentiary against the PLAINTIFF;

"c) From April 2000 through June 2001, Defendant failed to communicate and cooperate with the PLAINTIFF and as a result misrepresenting the PLAINTIFF in the underlying case;

In early September 2002, respondent filed a demurrer to the first amended complaint and a request for judicial notice, requesting the court to take judicial notice of the family law case file. Respondent asserted, among other things that because the injury alleged occurred after she was relieved as appellant's counsel, she was not responsible for

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"d) On February 5, 2001, DEFENDANT failed to appear for the court hearings;

"e) Failed to give notice of hearings and other court orders to the PLAINTIFF, including notice of order of relie[f] as attorney of record for PLAINTIFF, including but not limited to, notice of the mandatory settlement conference which was held on February 5, 2001 and which had been calendared in October 2000;

"f) DEFENDANT failed to notify PLAINTIFF of the court mandatory settlement conference hearing on April 2, 2001;

"g) DEFENDANT had failed to file a mandatory settlement brief for the April 2, 2001, mandatory settlement conference;

"h) Sanctions were granted against the DEFENDANT for her refusal to comply with the court orders on Sep. 19, 2000 and on Oct. 27, 2000;

"i) From April to June of 2000, Defendant was unavailable and went on a vacation for two months in the heat of the proceedings in the underlying case, leaving the PLAINTIFF without an attorney for a hearing which resulted in a restraining order against the PLAINTIFF;

"j) Failed to represent the PLAINTIFF in a restraining order hearing which resulted in court issuing a restraining order against the PLAINTIFF;

"k) From April of 2000 through June of 2001, Defendant failed to do any discovery;

"l) DEFENDANT did not serve the plaintiff with the order to be relieved as the attorney for PLAINTIFF;

"m) Defendant failed to return PLAINTIFF's file to the PLAINTIFF[.]"

the misconduct and that the complaint was time-barred because it was filed more than one year after she was relieved.

The court sustained the demurrer without leave to amend after taking judicial notice of the proof of service of an order relieving respondent as appellant's attorney of record. The court stated "since defendant was discharged from [the] case in April [2001], and could not possibly be responsible for the dismissal that occurred in October [2001], and [defendant], of course, made his appearance in June [2001], as noted on the court's minute order, and was fully aware of what happened." Thus, the court relied on a file containing the proof of service to determine, as a matter of law, appellant was aware as of April 17, 2001, respondent was no longer representing him. (*Ibid*.) Therefore, the court concluded no duty could have been owed from respondent to appellant on June 20, 2001, when default was entered against appellant, or on October 15, 2001, when the court entered the default judgment. (*Ibid*.)

Thereafter, appellant filed a motion for relief under section 473 and alternatively for reconsideration. The court denied appellant's motion for relief.

Appellant timely filed his notice of appeal.

DISCUSSION

I. Standard of Review

This court's task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action. In making that determination, we treat the demurrer as admitting all material facts properly pleaded; we assume the factual allegations are true and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300-301.) We do not, however, assume the truth of the contentions, deductions, or conclusions of fact or law. (*Ibid.*) When a demurrer is sustained, we decide whether the complaint states facts sufficient to constitute a cause of action. (*Blank v. Kirwan* (1985)

39 Cal.3d 311, 318.) In addition, where, as here, the demurrer is sustained without leave to amend, we must determine whether there is any reasonable possibility the defect can be cured by amendment: if it can, the trial court has abused its discretion and we must reverse. (*Ibid*.)

II. The Demurrer

Here the appellant claims the court erred: (1) in taking judicial notice of the proof of service of the order relieving respondent as his counsel; and (2) in sustaining the demurrer because his pleadings were sufficient to withstand it. As set forth below, even though we find the court did not err in taking judicial notice, we nonetheless conclude the court erred in sustaining the demurrer.

1. Whether the Court Properly Took Judicial Notice of the Proof of Service

The court's determination appellant's first amended complaint neither stated a sufficient cause of action nor could be amended to do so was based on the judicial notice of the truth of the proof of service. Appellant argues the court erred in taking judicial notice of the proof of service in the underlying action. Specifically, appellant argues it was improper for two reasons. First, the court may take judicial notice of only the documents in respondent's request. Second, even if the court could take judicial notice of documents respondent did not request, the court erred in taking judicial notice of the *truth* of such documents.

Section 452 of the Evidence Code permits the court to take judicial notice of court records even when not requested to do so. (Evid. Code, § 452.) These records include "any orders, findings of facts and conclusions of law, and judgments within court records." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91

Cal.App.4th 875, 882.) Therefore, the court did not err by taking judicial notice of documents not included in respondent's request.

Although the court had discretion to take judicial notice of the proof of service, it must be determined whether it had discretion to take judicial notice of its *truth*. "Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley*, *supra*, 91 Cal.App.4th at p. 882.) "The underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is *not reasonably subject to dispute*." (*Ibid*. citing Evid. Code, § 451, subd. (f).)

Generally, taking judicial notice of the facts asserted in a minute order is improper when it contains findings that were made without an adversary hearing. (*Id.* at p. 883.) Typically, "[a] court may not judicially notice the truth of assertions in declarations or affidavits filed in court proceedings." (*Bach v. McNelis* (1989) 207 Cal.App.3d 852, 865.) This is because a court cannot take the truth of the matter asserted in such documents because it would violate the hearsay rule. (*Ibid.*) However, proofs of service are treated differently from other affidavits. A proof of service is not inadmissible hearsay because Code of Civil Procedure section 2009 exempts them from the hearsay rule. (*Conservatorship of Forsythe* (1987) 192 Cal.App.3d 1406, 1410; *Conservatorship of Jones* (1986) 188 Cal.App.3d 306, 309; § 2009.) Therefore, while affidavits from prior proceedings cannot normally be used to prove the truth of the matter asserted, the court properly took judicial notice of the proof of service here to show appellant was in fact notified his counsel had been relieved.

2. Whether the Court Properly Sustained the Demurrer.

Notwithstanding the foregoing analysis, we nevertheless agree with appellant the court erred in sustaining the demurrer on his malpractice cause of action.

As set-forth above, appellant was deemed to have notice respondent no longer represented him as of April 13, 2001, and the injury alleged occurred at earliest on June 20, 2001, when the court entered the default in the underlying action, well after respondent was relieved as his counsel. Therefore, whether appellant can state a claim for malpractice turns on whether the harm for which he sues was proximately caused by respondent's actions taken *before* she was relieved as counsel or occurred as a result of events that happened *after* she was relieved, events for which she was not responsible. Appellant has specifically alleged the default was caused by conduct and actions (for example, the failure to file a Mandatory Settlement Brief) taken by respondent prior to April 13, 2001. Thus, appellant's pleading contains the requisite factual allegations that respondent caused his injuries.

Moreover, the first amended complaint is not, on its face, automatically barred by the relevant one-year statute of limitations. (§ 340.6. ["An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission"].) There is nothing in the complaint indicating appellant actually discovered or should have discovered the conduct which resulted in the default, more than one year before he filed his lawsuit on June 11, 2002. The mere fact respondent was relieved as counsel on April 13, 2001, (more than a year before he filed his claim) did not serve to put appellant on notice of respondent's conduct, including the failure to file the Mandatory Settlement Brief, which allegedly caused the default. Moreover, while respondent may well have discovered some of respondent's alleged failures when he appeared at the OSC on June 20, 2001, he filed his complaint less than a

year after the OSC hearing. Consequently, we conclude the court erred in sustaining the demurrer.[4]

DISPOSITION

The judgment is reversed and this matter is remanded to the trial court for further proceedings. On remand the trial court is directed to vacate its order sustaining the demurrer and to enter a new and different order overruling the demurrer. Appellant is entitled to costs on appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

ZELON, J.

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[4] Nothing herein should be read to suggest an opinion on whether appellant can prevail on his claim. We simply conclude his first amended complaint is sufficient to withstand a demurrer.